Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-832

RALPH DEAN,
Petitioner,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal
of the State of California,
First Appellate District, Division Two

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to the District Court of Appeal of the State of California, First Appellate District, Division Two

The petitioner, Ralph Dean, by and through his counsel, respectfully prays that a writ of certiorari issue to review the final order of the District Court of Appeal of the State of California, First Appellate District, Division Two, numbered 1/Crim. 18622, affirming petitioner's judgment of conviction after the California Supreme Court denied a petition for hearing.

OPINION BELOW

The unpublished opinion of the California District Court of Appeals, First Appellate District, Division Two, numbered 1/Crim. 18622, affirming petitioner's judgment of conviction, is set forth in Appendix "A" attached hereto (Pet. App. 1a-4a.)

JURISDICTION

The judgment of the California District Court of Appeals set forth in Appendix "A" hereto, was entered on July 5, 1979. On August 6, 1979, petitioner timely filed a petition for hearing with the California Supreme Court. On August 29, 1979, the Supreme Court of California denied the petition for hearing. A copy of that order is set forth in Appendix "B" attached hereto (Pet.App. 1-b).

Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

The sole question presented to this court is as follows:

Does the Fourth Amendment to the United States Constitution proscribe nighttime service of a California search warrant issued pursuant to Penal Code § 1533 where the sole justification for the issuance of the nighttime warrant is an allegation that the suspect is believed to be selling heroin?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal Constitutional provision involved herein is the Fourth Amendment to the United States Constitution. That Amendment provides in full:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The principal statutory provision involved herein is California Penal Code § 1533. That section states as follows:

> "Upon a showing of good cause, the magistrate may, in his discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 o'clock a.m. and 10 o'clock p.m."

STATEMENT OF THE CASE

A. Course of Proceedings Now Before This Court

On April 13, 1978, petitioner Ralph Dean was charged by an information in the Superior Court of California, City and County of San Francisco, with five offenses: (1) possession of more than half an ounce of heroin for the purposes of sale (California Health & Safety Code § 11351; California Penal Code § 1203.07); (2) possession of cocaine for the purpose of sale (California Health & Safety Code § 11351); (3) receiving or concealing stolen property (California Penal Code § 496); (4) possession of a hypodermic needle and syringe (California Business & Professions Code § 4143(a)); and (5) possession of less than one ounce of marijuana (California Health & Safety Code § 11357 (b)). Petitioner, represented by private counsel, pleaded not guilty to each of the aforementioned offenses.

Thereafter petitioner, through his attorney, filed a motion pursuant to California Penal Code §§ 995 and 1538.5 to suppress the contraband seized from his residence as a result of a search warrant. Petitioner claimed the service of the search warrant was illegal because the police executed the warrant at night without any justification and

violated state statutory knock-and-notice requirements. The trial court, however, denied the defense motions.

As a result of a plea bargain, petitioner withdrew his not guilty plea and on July 3, 1978, pleaded guilty to unlawful possession of heroin (§ 11350 of the California Health & Safety Code). Thereupon, the Superior Court dismissed all of the remaining offenses. Petitioner was then sentenced to state prison for a term of two years.

In accordance with Rule 31(d) of the California Rules of Court and California Penal Code § 1237.5, petitioner timely filed a notice of appeal from the judgment of conviction entered upon his plea of guilty. Petitioner was also placed on bail pending his appeal.

On appeal to the State District Court of Appeal, petitioner challenged the validity of the search warrant on two grounds: (1) the execution of the warrant at night violated California Penal Code § 1533, Article I, § 13 of the California Constitution, and the Fourth Amendment to the Federal Constitution; and (2) the service of the warrant failed to comply with the knock-and-notice provisions of California Penal Code §§ 844 and 1531.

On July 5, 1979, the California District Court of Appeal, First Appellate District, Division Two, in an unpublished opinion, rejected petitioner's claims and affirmed the judgment of conviction (See Appendix "A" attached hereto).

On August 6, 1979, petitioner filed a petition for hearing in the California Supreme Court claiming that the District Court of Appeal incorrectly decided that the nighttime warrant was properly authorized under California Penal

Code § 1533 and the Fourth Amendment to the Federal Constitution. However, the Supreme Court of California denied the petition on August 29, 1979 (See Appendix "B", attached hereto), and accordingly, petitioner now seeks succor from this Court via a writ of certiorari.

Petitioner's bail pending appeal has heretofore been discharged and he is presently serving his two-year term of imprisonment at the California Medical Facility at Vacaville, California.

B. Material Facts Concerning the Issuance of the Nighttime Search Warrant

For a period of five days—December 16, 1977 through December 21, 1977—Inspector Hendrix of the San Francisco Narcotics Detail received information from a reliable informant that heroin was being sold and stored at petitioner's San Francisco residence (1616 Golden Gate Avenue, Apartment #8). Based on this information, Inspector Hendrix prepared a four-page sworn affidavit in which he set forth the informant's observations and submitted the affidavit to a magistrate on December 21, 1978, to obtain a search warrant.[1] The magistrate then authorized a *nighttime* service of the search warrant even though the affidavit submitted by Inspector Hendrix in support of the search warrant failed to contain any justification or reason for a

[1]Petitioner readily acknowledges that the allegations of the informant set forth in Inspector Hendrix' affidavit fully comport with *Aguilar v. Texas* (1964) 378 U.S. 108 [84 S.Ct. 1509, 12 L.Ed. 2d 723], and as such, furnished the police with probable cause to search petitioner's residence during daylight hours.

nighttime service,[2] other than the allegation that heroin was believed to be stored at petitioner's residence.

Later that same evening, at approximately 11:45 p.m., more than a dozen members of the San Francisco Police Department, led by Inspector Hendrix, arrived at petitioner's residence and served the search warrant. After obtaining entry,[3] the police seized suspected contraband, most of which was in plain view, and petitioner and others were arrested.

REASONS FOR GRANTING THE WRIT

A. The State Appellate Court Decision Is in Conflict With the Principles of the Fourth Amendment

California, like most other states, provides that a search warrant may only be served during the daytime unless express authorization for a nighttime search is obtained: such authorization can be obtained only by some justification or "good cause" for a nighttime search. California Penal Code § 1533; *People v. Mardian* (1975) 47 Cal.App. 3d 16, 34 [121 Cal.Rptr. 269]; *People v. Watson* (1977) 75 Cal.App.3d 592, 598 [142 Cal.Rptr. 245]; see also Hall, Kamisar, La Fave and Isreal, *Modern Criminal Procedure* (3d ed. 1969), p. 269.

In affirming petitioner's conviction by upholding the validity of the nighttime search warrant, California adopted

[2]For example, the affidavit failed to mention that petitioner was selling narcotics at night, that petitioner was only expected to be there in the evening, or that the suspected narcotics would not be there the following morning.

[3]Even though petitioner on appeal challenged the police entry under the applicable statutory knock-and-notice provisions (California Penal Code §§ 844 and 1531), no such issue is raised herein.

a blanket rule: namely, that the nature of the contraband or the type of crime can *ipso facto* justify the issuance of a nighttime search warrant. However, this blanket rule cannot be squared with the constitutional test of reasonableness inherent in the Fourth Amendment because it focuses upon the nature of the crime rather than the particular facts known to the officer at the time the warrant is obtained and later executed.

This court has continuously held that the validity of a search conducted by police under the Fourth Amendment requires an examination of all the specific facts and circumstances known to the police. See, e.g., *Cooper v. State of California* (1967) 386 U.S. 58 [87 S.Ct. 788, 17 L.Ed.2d 730] reh. denied 386 U.S. 988 [87 S.Ct. 1283, 18 L.Ed.2d 243]. In adhering to this principle, this Court has rejected the blanket rule that looks solely to the type of crime and/or the nature of the contraband to justify the manner in which a warrant is obtained and executed. For example, in *Ker v. California* (1962) 374 U.S. 23 [83 S.Ct. 1623, 10 L.Ed.2d 726], this Court was called upon to review the constitutionality of state police effecting an entry into defendant's apartment through the use of a passkey without a prior announcement of their authority and purpose as required under state law. The officers had entered the premises to arrest the defendant for possession of marijuana. Although this Court found the method of entry was reasonable under the standards of the Fourth Amendment, it did so by analyzing the facts and circumstances underlying the reason for the unannounced entry and not by focusing solely upon the fact that narcotics were being stored. In particular the court found that the defendant's

previous furtive actions suggested that he was expecting the arrival of the police thus furnishing an exigent circumstance to excuse the otherwise unreasonable and constitutionally impermissible manner of entry.

And in *Roaden v. Kentucky* (1973) 413 U.S. 496 [93 S.Ct. 2796, 37 L.Ed.2d 757], this Court refused to justify a warrantless search on the ground that the contraband happened to be obscene books.

Furthermore, a majority of state jurisdictions have interpreted the Fourth Amendment as prohibiting the blanket rule utilized by the California appellate court in justifying the manner in which search warrants are executed. See, e.g., *People v. Gastelo* (1967) 67 Cal.2d 586 [63 Cal.Rptr. 10, 432 P.2d 706] (California); *People v. Stephens* (1974) 18 Ill.App.3d 907 [310 N.E.2d 755] (Illinois); *Commonwealth v. Newman* (1968) 429 Pa. 441 [240 A.2d 795] (Pennsylvania); *State v. Hatcher* (1970) 3 Wash.App.3d 411 [475 P.2d 802] (Washington).

Thus the manner in which a search warrant is executed —whether it be by unannounced entries or entries made late in the evening—can never be justified on a blanket basis, i.e., by looking to the nature of the crime of the type of contraband involved. Rather, a specific showing of articulable facts must be made to justify the manner in which the warrant is executed. Oddly enough, this principle was best articulated by the California Supreme Court in *People v. Gastelo, supra,* which stated:

> "Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard—the requirement of particularity—would be lost. Just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen." *Id.* at 588-589.

B. This Case Presents a Constitutional Question of Great Importance

In a plethora of decisions, this court has repeatedly acknowledged that the essential purpose of the Fourth Amendment is to shield the citizen from unwarranted intrusions into his privacy. See, e.g., *Johnson v. United States* (1948) 333 U.S. 10, 14 [68 S.Ct. 367, 369 L.Ed. 436]; *McDonald v. United States* (1948) 335 U.S. 451, 455 [69 S.Ct. 191, 93 L.Ed. 153]; *Jones v. United States* (1958) 357 U.S. 493, 498 [78 S.Ct. 1253, 2 L.Ed.2d 1514]; *Coolidge v. New Hampshire* (1971) 403 U.S. 443 [91 S.Ct. 2022, 29 L.Ed.2d 564].

This court has also repeatedly acknowledged that a search of a citizen's private residence conducted in the middle of the night by police officers is a more serious intrusion than an ordinary search and therefore requires a greater justification. See, e.g., *Jones v. United States, supra,* at 498; *Coolidge v. New Hampshire, supra,* at 477; *Monroe v. Pape* (1961) 365 U.S. 167, 210 [81 S.Ct. 473, 5 L.Ed.2d 492]; *Frank v. State of Maryland* (1959) 359 U.S. 360, 366 [79 S.Ct. 804, 3 L.Ed.2d 877]; *Wolf v. People of the State of Colorado* (1948) 338 U.S. 25, 27-28 [69 S.Ct.

1359, 93 L.Ed. 1782]; *Gooding v. United States* (1974) 416 U.S. 430, 463-465 [94 S.Ct. 1780, 40 L.Ed.2d 250] (Marshall, J., dissenting).

In the case at bar, the California court justified a nighttime search of petitioner's residence solely on the basis of information that he was dealing in narcotics. No mention was made to the Magistrate as to why a nighttime service was necessary. The affidavit supporting the search warrant did not allege, for example, that petitioner was expected only in the evening, or that petitioner was aware of police presence, or that the suspected narcotics would not be at petitioner's residence the following morning, or that narcotic activity at petitioner's residence only occurred in the evening.

Given these omissions, the State of California has failed to establish any justification for the middle of the night intrusion into petitioner's residence to execute the search warrant. This intrusion was an egregious violation of the Fourth Amendment and the fruits of the search must be suppressed.

CONCLUSION

This case presents an opportunity for this Court to bring consistency and uniformity to lower courts in fashioning a proper Fourth Amendment standard for the execution of nighttime warrants. In addition, this case will enable this court to reaffirm the continuing vitality of the Fourth Amendment as well as preserve one of its most treasured principles: the protection of privacy of a citizen's home. Therefore, petitioner respectfully requests this Court to grant this petition for a writ of certiorari.

Dated: November 22, 1979

TONY TAMBURELLO
RANDY MONTESANO
Counsel for Petitioner

(Appendices follow)

Appendices

APPENDIX A

Not to be Published
In Official Reports

In the Court of Appeal
of the
State of California

First Appellate District

Division Two

[Filed July 5, 1979]

The People,
Plaintiff and Respondent,
v.
Ralph E. Dean,
Defendant and Appellant.

1 Crim. No. 18622
(Super.Ct.No. 96633)

OPINION

The Court:*

Pursuant to a nighttime execution of a search warrant, San Francisco police seized heroin, cocaine, marijuana, narcotic paraphernalia, and a stolen shotgun from defendant's apartment. Defendant was charged with five offenses: (1) possession of more than half an ounce of heroin for the purpose of sale (Health & Saf. Code,

*Before Taylor, P.J., Rouse, J., and Miller, J.

§ 11351; Pen. Code, § 1203.07); (2) possession of cocaine for the purpose of sale (Health & Saf. Code, § 11351); (3) receiving or concealing stolen property (Pen. Code, § 496); (4) possession of a hypodermic needle and syringe (Bus. & Prof. Code, § 4143, subd. (a); and (5) possession of less than one ounce of marijuana (Health & Saf. Code, § 11357, subd. (b)). After defendant's motions to quash the search warrant and suppress the evidence were denied, he pleaded guilty to unlawful possession of heroin (Health & Saf. Code, § 11350) as a lesser included offense (count one), and the other charges were dismissed.

On appeal from the judgment of conviction, defendant argues that the declaration in support of the search warrant failed to show good cause for a nighttime search (i.e., after 10 p.m.) (see Pen. Code, § 1533). The trial court, in upholding the nighttime search, based its decision on *Solis v. Superior Court* (1966) 63 Cal.2d 774, which involved a similar affidavit. Defendant, relying primarily on *People v. Watson* (1977) 75 Cal.App.3d 592, argues that Solis is no longer good law in light of the Supreme Court's reasoning in *People v. Gastelo* (1967) 67 Cal.2d 586 and *People v. De Santiago* (1969) 71 Cal.2d 18, which involved the sufficiency of facts justifying noncompliance with the entry requirements of Penal Code sections 844 and 1531.

We agree with the court's statements in *Watson* that in *Solis* the Supreme Court gave a broad and rather loose interpretation to the "good cause" requirement of section 1533, and that if *Solis* were before that court today it would be decided differently. We note, also, that the Supreme Court denied a petition for hearing in *Watson*. However, we do not agree with defendant's argument that *Solis* has

been overruled or disapproved by implication. While there may be some basis for distinguishing *Watson* from *Solis*, the facts in the instant case are on all fours with *Solis*.

In the instant case, the declaration shows that during the preceding five days an undercover agent of the police made two purchases of heroin from defendant at his apartment. Each sale involved about 4.5 grams of heroin at a cost of $350. Defendant reportedly told the undercover agent he had heroin available for sale at any time, which suggests that defendant was a major dealer. The declaration fails to state expressly any additional reasons for a nighttime search. However, in light of *Solis*, we conclude that the magistrate did not abuse his discretion in authorizing nighttime service of the search warrant.

Defendant also argues that the evidence should be suppressed because the officers did not comply with the entry requirements of Penal Code section 1531. The record shows, however, that at the time (11:45 p.m.) the officers executed the search warrant, defendant was holding a party for approximately 24 people in his apartment. Before the inspector forced his way through the iron gate and front door, he knocked on the front door a number of times, identified himself as a police officer, announced that he had a search warrant, and then waited about five minutes without receiving a response. At the same time, another officer was at the apartment building entrance ringing defendant's doorbell. Accordingly, there was substantial evidence to support a finding that the officers complied with the entry requirements (see generally, *People v. Superior Court (Johnson)* (1972) 6 Cal.3d 704, 714).

Judgment affirmed.

APPENDIX B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

August 29, 1979

I have this day filed Order

HEARING DENIED

In re: 1 Crim.No.18622
People

vs.

Dean

Respectfully,

G. E. BISHEL
Clerk